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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 168

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Wisconsin corporation,

Plaintiff and Petitioner,

v.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, AUSTIN B. MIDDLETON and LEONARD C. YOUNG, Members of said Board, and ARNOLD OLSEN, Attorney General of the State of Montana,

Defendants and Respondents,

and

THE RAILROAD BROTHERHOODS OF RAILROAD TRAINMEN, ENGINEERS, FIREMEN and CONDUCTORS, hereinafter designated as THE FOUR BROTHERHOODS,

Intervenors and Respondents,

and

CITIZENS' COMMITTEE, a Voluntary Organization along said Line of Railroad,

Intervenors and Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The petitioner herein, Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter for convenience sometimes referred to as the Railroad), prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above-entitled case on March 5, 1953.

REFERENCES TO RECORD

The entire transcript on appeal to the Supreme Court of Montana, including all original exhibits, and all proceedings had in the Supreme Court of Montana, have been certified and filed with the Clerk of this Court. By stipulation also filed with the Clerk of this Court, only a portion of the transcript and proceedings before the Montana Supreme Court has been printed in connection with this petition; however, it is further provided therein that reference may be made to any of the unprinted portions of the record (R. 74). References made herein to the printed record will be designated (R. .....). References to unprinted portions of the transcript and to original exhibits will be designated (Tr. .....) and (Ex. .....), respectively.

OPINIONS BELOW

The order of the Board of Railroad Commissioners of the State of Montana (R. 6) is reported in 89 P.U.R. (NS) 475. The judgment of the Montana District Court (R. 52) is not reported. The opinion of the Supreme Court of the State of Montana (R. 62) and its order denying rehearing (R. 71) are reported in 255 P.(2d) 346-352, but they are not as yet printed in the Montana Reports.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on March 5, 1953 (R. 62). The Railroad's petition for rehearing was denied by order dated April 13, 1953 (R. 71), at which time the remittitur of that Court was also issued (R. 71), thereby constituting final judgment by the highest court in the State of Montana.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257 (3), set forth in the Appendix *infra*,

on the ground that the judgment of the Montana Supreme Court deprives this railroad of its property without due process of law, and denies it equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and casts an undue burden on interstate commerce contrary to Section 8 of Article I of the Constitution of the United States.

These Federal questions were first raised in these court proceedings by allegations contained in petitioner's complaint in the Montana District Court (R. 4). Petitioner's contentions were sustained by the Findings of Fact and Conclusions of Law of the District Court (R. 58). On appeal the Montana Supreme Court reversed the decision of the District Court and affirmed the Board's order, thereby expressly denying petitioner's contentions based on the aforementioned Constitutional grounds (R. 62, 69).

QUESTIONS PRESENTED

The Board's order and the judgment of the Montana Supreme Court denied an application by the Railroad to discontinue the operation of certain passenger trains which are being operated at heavy out-of-pocket loss, ranging from $77,000.00 for the year 1946 to $117,000.00 (based on the first eight months) for the year 1951. The ultimate question to be determined on the merits is whether the Board's order and the decision of the Montana Supreme Court transcend such reasonable limits as may be justified by public convenience and necessity so as to constitute an unreasonable, arbitrary and unjust encroachment on petitioner's rights guaranteed by the United States Constitution and an undue burden on interstate commerce; and in this connection, we submit that the judgment rendered in this case by the Montana Supreme Court is in

direct conflict with former decisions of this Court in the cases of *Mississippi Railroad Commission, et al, v. Mobile and Ohio Railroad Co., 244 U.S. 388* and *Northern Pacific Railroad Co.* v. *State of North Dakota, 236 U.S. 585,* which are discussed hereinafter.

For purposes of this petition, the questions involved assume extraordinary importance and the case commends itself especially to review by this Court, by reason of the fact that the elimination of deficit passenger train service is generally recognized as being one of the most vital economic problems confronting the nation-wide railroad industry today, and demands a realistic and uniform treatment in each of the various states. By recent decison of this Court, *Alabama Public Service Commission* v. *Southern Railroad Company,* 341 U.S. 341, such matters have now been delegated to the State Courts to determine, at least in the first instance. To our knowledge, this is the first case of its kind to reach this Court since the decision in the *Alabama-Southern* case; and in order to correct what we believe to be a case of flagrant abuse of such delegated rights by local authorities for selfish purposes in direct conflict with principles established by former decisions of this Court, and in order to maintain some semblance of uniformity among the various states in dealing with this widespread problem, and perhaps establish an effective precedent for future guidance in similar cases, it is submitted that this Court should review the Montana decision in the instant case. If not, the constitutional rights of any citizen can be circumvented and rendered valueless just as easily as would be the case of this Railroad under the *Alabama-Southern* decision, and every individual could be left in like manner to the mercy of the State Courts in determining the Constitutional validity of their own statutes and administrative orders.

STATUTES INVOLVED

The Montana statutes under which these proceedings were first instituted, the Federal Statute governing this petition, and the United States Constitutional provisions relied upon, are set forth in the Appendix *infra*.

STATEMENT

The main line of the Milwaukee Railroad extends across the State of Montana in a general easterly and westerly direction, passing through the town of Harlowton approximately midway through the State. A branch line, located entirely within the State of Montana, extends from Harlowton in a northerly direction to Lewistown, and thence westerly to Great Falls, a total distance of approximately 200 miles. Milwaukee train No. 117 operates from Harlowton to Great Falls, and train No. 118 operates from Great Falls to Harlowton, over this branch line on a daily schedule. In general, there are approximately 10 towns on the line with a population of more than 100 people; there are approximately 10 towns that have a population of less than 100; and there are approximately 10 places that have no population recorded at all (Ex. 7 and 40).

By petition dated November 15, 1950, the Railroad applied to the Board of Railroad Commissioners for authority to discontinue the operation of the aforementioned passenger trains Nos. 117 and 118. This procedure was in keeping with the provisions of Sections 72-123, R.C.M. 1947, set forth in the Appendix *infra*, and the Board's General Order No. 80 adopted January 9, 1914, which in effect prohibits the curtailment or discontinuance of passenger train service without prior authorization by the Board.

After public hearing held at Lewistown beginning January 17, 1951, and by order dated March 6, 1951, set

forth as Exhibit A attached to Plaintiff's Complaint in these Court proceedings (R. 6), the Commission denied and dismissed the Railroad's application.

Omitting for the present any reference to a suit filed by the Railroad in the Federal Court to set aside the Board's order and enjoin its enforcement, as explained hereinafter under the heading "Reason for Granting the Writ," the Railroad thereupon instituted the Court proceedings here involved against the Board and its individual members as defendants, by Complaint filed on June 30, 1951 (R. 1), being technically designated as an action to determine the reasonableness of the Board's order, under the provisions of Section 72-132, R.C.M., 1947, set forth in the Appendix *infra*. Other parties were allowed to intervene as defendants, and after trial beginning October 23, 1951, at which the record as made at the Board hearing and considerable additional testimony and exhibits were introduced as evidence, the District Court entered its Findings and Decree under date of July 29, 1952 (R. 52), which reversed the Board's order and granted the application as originally filed by the Railroad. In so doing the District Court specifically found (R. 58) that there was no public need or convenience for the train service, and that the Board's order violated the provisions of the United States Constitution hereinbefore referred to, as alleged in the Railroad's Complaint. The Board of Railroad Commissioners and the other parties defendant thereupon appealed to the Supreme Court of the State of Montana (R. 60), which ultimately resulted in the Supreme Court's opinion and decision dated March 5, 1953 (R. 62), reversing the District Court and reinstating the order as originally entered by the Board. A petition for rehearing was filed by the Railroad (R. 70), and was denied by order of the Supreme Court rendered on April 13, 1953 (R. 71),

constituting final action by the highest Court in the State of Montana.

SPECIFICATION OF ERRORS

The Supreme Court of Montana erred:

(1) In holding that public convenience and necessity require the continued operation of Milwaukee trains Nos. 117 and 118.

(2) In failing to hold that the Milwaukee Railroad was entitled to discontinue the operation of its trains Nos. 117 and 118.

(3) In failing to hold that the order of the Board of Railroad Commissioners requiring the Milwaukee Railroad to continue the operation of its trains Nos. 117 and 118 violates the Fourteenth Amendment to the Constitution of the United States.

(4) In failing to hold that the order of the Board of Railroad Commissioners requiring the Railroad to continue the operation of Milwaukee trains Nos. 117 and 118 constitutes an unreasonable burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution.

(5) In reversing the Findings and Decree of the District Court.

REASONS FOR GRANTING THE WRIT

The enormous loss resulting from the operation of deficit passenger trains has been a matter of growing concern not only to the American railroad industry itself, but also to practically every State and Federal regulatory agency. Since World War II the railroads, like every other major industry in the United States, have been confronted with a constantly increasing cost of operation, due primarily to the increased cost of labor and supplies. In

order to keep pace with these steadily rising costs, it has been necessary for the railroads to seek repeated increases in both freight and passenger rates, and in each instance the economic waste resulting from deficit passenger train operations has been recognized as a matter of growing importance and concern to each of the agencies involved.

In connection with the freight increases granted in *Ex Parte 168, Increased Freight Rates 1948,* 276 I.C.C. 9, 32-40, the Interstate Commence Commission expressed concern over this problem. In its findings the Commission developed the fact that in 1949 the railroads lost some $559,000,000.00 in operating passenger trains, which of necessity had to be compensated for by the earnings out of freight. The railroads were admonished and in effect directed by the Interstate Commerce Commission to minimize this enormous loss by the abandonment and discontinuance of deficit passenger train operations whenever possible.

The same attitude toward this general problem, and a corresponding appeal to the State agencies involved, is expressed in the *Progress Report of the Senate Committee on Interstate and Foreign Commerce*—Domestic Land and Water Transportation Subcommittee, reporting on transportation studies conducted pursuant to Senate Resolution No. 50 (82nd Congress, 1st Session, Report No. 1039, pp. 67, 68 and 70):

> "An additional problem in State regulation hinges on the attempt of the railroads to abandon service, usually passenger carriage, which has proved financially unsound. State commissions are understandably loath to permit abandonment of any service, as the beneficiaries of that service are local residents, and their protests are much more effective than that of the railroad. Losses from unprofitable passenger service particularly have been a substantially contributing factor

in the poor financial status of the major railroads today.

* * * *

The significance of this loss of passenger traffic to the railroads is that it decreases the railroad revenues from, and in, a field in which operating deficits are common. As has been pointed out heretofore, a more realistic approach to the abandonment of unprofitable passenger lines certainly is indicated on the part of the Commission and State regulatory agencies."

So, also, in the *Report of Proceedings* had at the *61st Convention of the National Association of Railroad and Utilities Commissioners,* it is said that the elimination of passenger deficit operations is one of the most important economies to be undertaken by the Railroads. Several years ago this Association appointed a special committee to study this problem. Having recently concluded its work and published its report, and after reviewing the whole problem involved, this committee made as its No. 1 recommendation the following:

"That the railroads re-evaluate the results of the May, 1951, study of individual deficit passenger trains in the light of changes in mail pay rates and in operating expenses, and that each railroad seek authority from the appropriate commission, or commissions, to discontinue operation of each passenger train which is producing (at current levels of rates, fares and charges) revenues substantially less than the operating expenses (at current levels of wages and prices) reflected in the accounts shown on the summary of the May, 1951, study, attached to this report as Appendix XIX; and that the regulatory bodies in acting upon such applications should adhere vigorously to the principle that where the service cannot be made compensatory its abandonment should be permitted." (*Report of the Special Committee in co-operation with the ICC on the Study of the Railroad Passenger Deficit Problem, National Association of Railroad and Utilities Commissioners, 1952.*)

This Court has itself recognized these expressions with tacit approval in the case of *Alabama Public Service Commission* v. *Southern Railroad Company*, 341 U.S. 341, 346, previously referred to, where the Court says:

> "State and Federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American Railroads, and have recommended drastic action to minimize the deficit, including the discontinuance of unpatronized and unprofitable service."

Consistent with the foregoing admonitions, and in order to maintain essential railroad services on a sound economic basis, the railroads in general, and the Milwaukee in particular, have endeavored to effect all possible economies in railroad operations. Extensive studies have been conducted on a system-wide basis to determine what particular passenger trains are responsible for these enormous losses, and concerted efforts have been made to eliminate them wherever possible (Tr. 114). The importance of this problem to the Milwaukee is apparent from the fact that in 1950 the direct out-of-pocket loss resulting from passenger operations amounted to approximately $6,200,000.00, and approximately $18,000,000.00 on a fully apportioned cost basis (Tr. 115).

The studies referred to above developed the fact that the great bulk of these losses were attributable to passenger trains operating on branch or secondary lines (Tr. 116, 252), where highway transportation has eliminated the need for local passenger trains, and the public has abandoned the use of trains in favor of motor vehicles. In an attempt to keep abreast with these changed conditions and eliminate all unnecessary losses while yet preserving essential service, the Milwaukee has greatly reduced its branch line passenger operations. During the year

1949, the Milwaukee Railroad discontinued 605,799 miles of passenger operations, on an annual basis. In 1950 an additional 732,009 miles of operations were taken off. At the end of 1950 applications were pending for the elimination of twenty additional trains, aggregating approximately 1,277,000 miles annually (Tr. 236; Ex. 42, page 13). At the time of trial the Milwaukee had discontinued forty-four passenger trains, leaving only six applications still pending, including the one now under consideration; in all the Milwaukee has thus eliminated the operation of approximately 7,000 passenger train miles per day (Tr. 243). These operations involve every state in which the Milwaukee operates except Michigan and Nebraska (Tr. 244). In many instances the operations discontinued involved greater traffic and less expense, than the operation here under consideration; in several instances the communities affected were left without any other railroad service and were not served by any other form of common carrier service such as buses or trucks; in some instances road conditions were comparable in all respects with those complained of in the case now under consideration (Tr. 260-264).

By its decision in the instant case, it is believed that the Board of Railroad Commissioners and the Supreme Court of the State of Montana have not only reached a legally erroneous conclusion, but they have also demonstrated an obvious intention to disregard the urgent admonitions of more responsible agencies and courts concerned with the seriousness of the problem involved, as noted above, and have refused to conform with standard principles generally accepted and applied by other states in a matter where uniformity throughout all the states is essential.

Until recently it was possible, and indeed it was com-

mon practice, to obtain judicial review in matters such as this before a three-judge Federal Court under the provisions of 28 U.S.C.A., Sections 2281 and 2284, with consequent right of direct appeal to this Court, thereby insuring uniformity in treatment and decision throughout all the states.

Actually, in the case now under consideration, the Milwaukee Railroad attempted to invoke redress through the Federal Court before resorting to the State Court. Following the Board's order, and on May 4, 1951, the Milwaukee filed suit against the Board in the United States District Court at Butte, Montana, to set aside the Board's order and enjoin its enforcement under the provisions of 28 U.S.C.A., Sections 2281 and 2284, involving a three-judge court. Tentative arrangements for a hearing thereon had been made when this Court released its decision dated May 21, 1951, in the aforementioned case of *Alabama Public Service Commission* v. *Southern Railroad Company*, 341 U.S. 341, wherein it was held in effect that while the Federal Courts have jurisdiction in such matters, they should henceforth refuse to exercise it until all procedural remedies afforded by the State Courts have been exhausted. As a consequence, all further proceedings in the Federal Court had to be abandoned, and the case now under consideration was filed anew in the State Court.

Having thus by its decision in the *Alabama-Southern* case entrusted the review of such matters to the State Courts, and having in effect precluded recourse to the Federal Courts, it is respectfully submitted that this Court should now grant us the writ prayed for in the instant case to review a flagrant disregard and abuse by the Montana Supreme Court of privileges granted it by this Court under the *Alabama-Southern* decision. Unless corrected in the manner prayed for, the instant case will establish the

unfortunate precedent never intended by this Court under its *Alabama-Southern* decision, which will leave each State free to determine the problem in accordance with its own arbitrary, and sometimes selfish, views in complete disregard of Constitutional rights involved, and thereby cast an undue burden upon other States and upon interstate commerce as a whole, with absolute security and beyond reproach by this or any other nation-wide authority. The temptation of State authorities, thus unrestrained, to destroy Constitutional rights is obvious.

Without at this time attempting to argue the merits of the case itself, but merely to demonstrate the patent injustice of the Montana decision, we will briefly summarize some of the more significant and undisputed facts developed in connection with the operation of the trains involved in this case.

Train statistics over a five-year period preceding the hearing in this case reveal that in the case of trains Nos. 117 and 118 there has been a consistent and substantial decline in the use being made by the public of these trains, accompanied at the same time with an equally consistent and substantial increase in operating costs and out-of-pocket losses, to such extent that the disproportionate results plainly speak a lack of any existing public need or convenience for the continued operation of these trains, and on the contrary eminently justify their discontinuance.

With respect to the decline in use by the public, the salient points of various exhibits were well summarized

by the Trial Court's Findings of Fact (R. 56), as follows:

Year	Passengers	Average Number of passengers per trip	Average Number of passengers per train mile
1946	19,545	26.92	.172
1947	15,518	21.26	.107
1948	13,135	18.40	.090
1949	13,193	18.07	.090
1950	8,958	12.30	.062
1951 (8 mos.)	4,618	9.5	.048

In connection with the foregoing, it should be noted also, as pointed out in the Trial Court's Findings (R. 56) that the traffic figures set forth above include passengers to and from points having other common carrier transportation facilities amounting to approximately 40% of the total traffic actually handled by these trains.

In contrast with the reduction in use, the constant increase in out-of-pocket expenses, not including any allowance for interest, depreciation or other commonly accepted charges, and the net out-of-pocket losses resulting, as shown by various exhibits, were also summarized in the Trial Court's Findings of Fact (R. 56), as follows:

Year	Total Revenues	Out-of-Pocket Expenses	Out-of-Pocket Loss	Loss Per Trip
1946	$67,427	$144,435	$77,008	$106.07
1947	68,911	158,276	89,365	122.42
1948	68,780	157,504	88,724	124.26
1949	68,271	145,838	77,567	106.26
1950	57,244	153,601	96,357	132.36
1951 (8 mos.)	34,417	112,491	78,074	160.64

Actually, as demonstrated by Exhibits 44, 45 and 46, crew wages alone have exceeded total revenue beginning in 1949, and the gap between the two has become progressively wider up to the present time.

From the foregoing figures, and even if it be assumed

that the total revenue was derived from passenger traffic, (which is not actually the case, since a portion of the total revenue is accounted for by baggage, express, etc.,) simple arithmetic demonstrates that in 1950 total revenues amounted to only $6.39 per passenger, whereas, total expenses amounted to $17.14 per passenger, or a loss of $10.75 per passenger; in other words, for each $6.39 contributed by the public, the Railroad was required to contribute in addition $10.75 from other sources in order to defray the out-of-pocket expenses. Similarly, during the first 8 months of 1951, the total revenues amounted to only $7.45 per passenger as compared with total expenses amounting to $24.36 per passenger, or a loss of $16.91 per passenger; for each $7.45 contributed by the public for this service, the Railroad was required to contribute in addition $16.91 from other sources.

Regardless of what view may be taken as to the importance of the total amounts involved in and of themselves, certainly the ratio between revenues and expenses clearly demonstrates that there does not exist sufficient public need or convenience to justify the continuation of this service.

The Milwaukee Railroad went through receivership in 1925-1928, and reorganization in bankruptcy in 1935-1945. Ever since reorganization, and despite the Korean War's effect to increase railroad business, the Milwaukee has not earned any kind of reasonable or fair return on its capital. Its rate of return on net investment is tabulated as follows (Tr. 139, Ex. 29, R. 57):

1946	1.95%
1947	2.38
1948	2.14
1949	1.49
1950	2.93

For this reason the impact of the Montana Court's arbitrary and unreasonable requirement that the Railroad continue to pour its meager earnings into a dead loss for the sake of a public use which has obviously dwindled almost to the vanishing point, presents a clear-cut challenge to define the margins of constitutional safeguards. This case is not like the case of *Alabama Public Service Commission* v. *Southern Railroad Company*, 341 U.S. 341, where the record showed substantial earnings by the Southern Railway, both system-wide and state-wide. Here the Milwaukee shows but marginal earnings, barely above the line of insolvency. Surely this Court does not declare it to be the law that a railroad can be arbitrarily compelled by any State to render service at a loss until it has been bled totally white, and is actually forced into financial default, before it can seek relief under the Fourteenth Amendment.

We do not mean to say that discontinuance of train service is justified merely because the cost of operation exceeds revenues, or because a net loss may result; but where the ratio between the two becomes so disproportionate as in the instant case, it demonstrates, we submit, a proper case for discontinuance under well established principles laid down by this Court in the following decisions, with which the Montana Supreme Court decision is clearly in conflict:

Mississippi Railroad Commission, et al, v. *Mobile & Ohio Railroad Company,* 244 U.S. 388, 391:

> "But, while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation or without

due process of law. *Wisconsin, Minnesota & Pacific R.R.* v. *Jacobson*, 179 U.S. 287; *Atlantic Coast Line R.R. Co.* v. *North Carolina Corporation Commission*, 206 U.S. 1; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585; *Chicago, Milwaukee & St. Paul R.R. Co.*, v. *Wisconsin*, 238 U.S. 491.

This power of regulation, if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, passes beyond lawful bounds, and is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. *Atlantic Coast Line R.R. Co.* v. *North Carolina Corporation Commission*, 206 U.S. 1; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U.S. 196; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U.S. 340; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585."

Northern Pacific Ry Co. v. *State of North Dakota*, 236 U.S. 585, 604:

"* * * The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

CONCLUSION

In conclusion, we believe this case presents an extreme situation, strikingly illustrating the necessity for a clarifying decision to serve as a guide for sensible and consistent treatment of a problem common to all railroads, and now

relegated to the varying commissions and courts of the 48 states; and the Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 6, 1953.

APPENDIX

MONTANA STATUTES

72-123 R. C. M. 1947: POWER TO COMPEL RAILROAD COMPANIES TO PROVIDE ADEQUATE ACCOMMODATIONS AND SERVICE. The board shall have the power, and it shall be its duty, to compel any and all railroads subject hereto, to provide, maintain, and operate sufficient train service, both freight and passenger, for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting-rooms for passengers, and suitable rooms for freight and baggage at all stations.

72-132 R. C. M. 1947: ACTION TO DETERMINE REASONABLENESS OF RATES OR CLASSIFICATION. Any railroad may bring an action in the district court of the county where the principal office or place of business is situated, or in any county where any such classification, rate, toll, charge, regulation, or order of the board is applicable, against the said board as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order made, fixed, or established by the board under the provisions of this act is just and reasonable; provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; and provided further, that in any action, hearing, or proceeding in any court, the classification, rate, tolls, charges, regulations, and orders made, fixed, and established by said board shall prima facie be deemed to be just, reasonable, and proper. All costs and expenses incurred in the hearing, trial, or appeal of any action brought under this section shall be fixed and assessed as to the court may seem just and equitable.

UNITED STATES STATUTES

28 U.S.C.A. §1257: STATE COURTS; APPEAL; CERTIORARI:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • • • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (June 25, 1948, c. 646, 62 Stat. 929.)

UNITED STATES CONSTITUTION

Article I, Section 8:

"8. The congress shall have power—

• • • • •

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; • • •"

Amendment 14:

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

16

In the
Supreme Court of the United States
OCTOBER TERM, 1916

No. 188

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

Brief for the Respondent Board of Railroad Commissioners of the State of Montana in Opposition.

Attorney-General of Montana,

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In the
Supreme Court of the United States
OCTOBER TERM, 1953

No. 168

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Petitioner,*

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Brief for the Respondent Board of Railroad Commissioners of the State of Montana in Opposition

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OPINIONS BELOW

The order of the Board of Railroad Commissioners of the State of Montana, here under attack, is set forth in the Record beginning at page 6 and is reported in 89 P. U. R. (NS) 475. The opinion of the Supreme Court of Montana (R. 62) has not been officially reported, but is reported in 255 Pac. (2) 346.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on March 5th, 1953. (R. 62) Petition for rehearing was denied on April 13th, 1953, and remittitur issued on that date. (R. 71) The petition for a writ of certiorari was filed on July 8th, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1257 (3).

QUESTIONS PRESENTED

The Milwaukee made application to the Board for authority to discontinue operation of one passenger train operating each way daily between Harlowton, Montana, and Great Falls, Montana. This application, after public hearing, was denied by the Board by its order. (R. 6) From the original transcript of the Board hearing and the exhibits which are filed with the Court, but not yet printed, and from the order of the Board it appears that the trains in question are the only passenger trains operated on this branch line, that the trains are admittedly operated at a loss but that the railroad system-wide and in Montana is operating at a profit and that this particular branch is a "good revenue producer." It further appears that for a distance of 136 miles of the total mileage of 199 miles involved that the roads are not "all weather roads" and that there are no other common carriers of persons or property than the Milwaukee serving this area. The Board's denial of the application was on the facts before it and the needs of the public for continuation of the service. The Supreme Court of Montana in its opinion

held that the Board action was not unreasonable under the facts and further that the facts did not warrant finding that the Milwaukee was deprived of any of its rights under the Fourteenth Amendment of the United States Constitution. (R. 62, 67-69) The only question presented by the petition is whether the Order of the Board and the Final Judgment of the Supreme Court of Montana sustaining such order, result in any violation of the Constitution of the United States.

STATUTES INVOLVED

The applicable state statutes are printed in the appendix, infra.

STATEMENT

The statement made by petitioners is substantially correct and no new statement will be made. We do, however, specifically call the Court's attention to the summary of facts appearing in the Board's Order (R. 7-15) and the Supreme Court of Montana statement of the facts. (R. 63-67)

SUMMARY OF ARGUMENT

POINT A. The decision of the Montana Court as to matters of statutory construction do not constitute federal questions. The decision of the Montana Court on these matters is final. The questions of state authority and interpretation of powers of the Board and questions as to the existence of public convenience and necessity are local matters and do not involve any federal questions. The question of train discontinuance is a local matter to be decided under state

law and by state courts. There is no justification to any inference that the State Board and the Montana Supreme Court did not act in accordance with the law and the evidence presented in the present instance.

POINT B. Congress has not delegated any authority under the Commerce Clause of Article 1, Section 8, to the Interstate Commerce Commission. The Court may not under such circumstances consider the impact of the state action on interstate commerce. If federal control or uniformity is desired Congress must so state and until such legislation is enacted the problems of train discontinuance remain a matter of state control.

POINT C. The Montana Court recognized that the railroads were under the protection of the 14th Amendment but held that the record in this case was insufficient to show any infringement with the provisions of that Amendment. The decision of the Montana Court is in accord with the controlling decisions. There is no substantial federal question for determination.

POINT A.

The Decision of the Montana Supreme Court Interpreting the Authority Vested in the State Board Is a Determination of State Statutes.

The Supreme Court of Montana in reviewing the action of the District Court and of the Board held that the review of orders of the Board was limited to consideration of the questions: (1) Did the Board act beyond the power which

it could constitutionally exercise? (2) Did the Board act beyond its statutory power? (3) Did the Board base its action on a mistake of law? The questions are to be further limited as to whether the acts of the Board are in violation of constitutional questions, or so arbitrary and unjust as to make the finding contrary to evidence. (R. 65) The Court then finds that the lower court erred in holding that the Board abused its lawful discretion and delegated authority and determined that the Board was within its lawful bounds in finding that there was need and convenience for the continued operation of the trains, and further determined that the lower court was without power to substitute its judgment for that of the Board. (R. 67, 68)

The decision of the Montana Court on these questions of statutory interpretation of the authority of the Board and of the courts on review of Board action are ones of state statutory construction. No federal question is involved, and the decision of the Montana Supreme Court is final.

Great Northern Railroad Co. v. Sunburst Oil & Refining Co., 287 U. S. 387, 53 Sup. Ct. 145, 77 L. Ed. 247;
Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187;
Erie Railroad Co. v. Thompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188;
Huddleston v. Dwyer, 322 U. S. 232, 64 Sup. Ct. 1015, 88 L. Ed. 1246.

This Court in Alabama Public Service Comm. v. Southern Ry. Co., 341 U. S. 341, 71 Sup. Ct. 762 (hereafter referred to as the Alabama Case) had before it the question

as to whether federal courts should take jurisdiction in actions involving determinations by a state regulatory agency relating to discontinuance of passenger train service. There, as here, no question of the authority of the state board was raised. The sole question was whether the federal courts should initially determine whether that authority was properly exercised or violated constitutional limits. The Court held that the remedy through the state court should be followed. Proceedings in the state court would be final, unless the decision resulted in violation of the United States Constitution. This Court further recognized the fact that the specific train discontinuance application involves the predominant local factor of public need for the service. This problem has here been resolved in favor of continuance of the two trains in question and the Montana Supreme Court has upheld the Board's action. No federal question is involved.

The Record Does Not Support the Allegations of Intent by the Montana Board or Montana Court to Disregard Their Duties.

On page 4 of the petition, referring to the effect of the Alabama Case, supra, petitioners say:

> "To our knowledge this is the first case of its kind to reach this Court since the decision in the Alabama-Southern Case; and in order to correct what we believe to be a case of flagrant abuse of such delegated rights by local authorities for *selfish* purposes in direct conflict with principles established by former decisions of this Court, * * * it is submitted that this Court should review the Montana decision in the instant case." (Emphasis ours)

The petition on pages 7-11 reviews certain statements of the Interstate Commerce Commission, Congressional Committees and the National Association of Railroad and Utilities Commissioners. The petitioners then say on page 11:

> "By its decision in the instant case, it is believed that the Board of Railroad Commissioners and the Supreme Court of the State of Montana have not only reached a legally erroneous conclusion, but they have also demonstrated an ***obvious intention to disregard*** the urgent admonitions of more responsible agencies and courts concerned with the seriousness of the problem involved, as noted above, and have ***refused to conform with standard principles*** generally accepted and applied by other states in a matter where uniformity throughout all the states is essential." (Emphasis ours)

The petitioner then states, on pages 12 and 13:

> "Having thus by its decision in the Alabama-Southern case entrusted the review of such matters to the State Courts, and having in effect precluded recourse to the Federal Courts, it is respectfully submitted that this Court should now grant us the writ prayed for in the instant case to review ***a flagrant disregard and abuse by the Montana Supreme Court of privileges granted it by this Court under the Alabama-Southern decision.*** Unless corrected in the manner prayed for, the instant case will establish the unfortunate precedent never intended by this Court under its Alabama-Southern decision, which will leave each State free to determine the problem in accordance ***with its own arbitrary, and sometimes selfish views in complete disregard of Constitutional rights involved,*** and thereby cast an undue burden upon other States and upon interstate commerce as a whole, with absolute security and beyond reproach by this or any other nation-wide authority. ***The temptation of State authorities, thus unrestrained, to destroy Constitutional rights is obvious.***" (Emphasis ours)

This case was decided by a state board to which the legislature had delegated authority in such matters. It was properly reviewed by the highest judicial arm of the state and its decision was rendered on the facts and record before it in this particular case. General statements of policy or facts existing with regard to other trains are not controlling. This case properly is to be decided on the facts existing in connection with these particular trains. Under the law as it now exists, neither Congressional Committees nor the Interstate Commerce Commission has any authority over the question here in issue. With all due respect to the views of federal agencies, we submit that they have no authority under present law, nor are they more responsible than the legislative, executive or judicial agencies of the State of Montana. No reason or basis exists for the implication or direct statement of petitioners that the Montana Board and Montana Court did not decide the instant case on the law and evidence before them. No reason exists to assume that the state courts will not render decisions in conformity with law and the Constitution.

The petition apparently takes the view the decision in the Alabama case, supra, changed the law. Our view is that the decision in that case changed only the law of procedure by holding that the question of train discontinuance being a state problem should be decided by the state courts, rather than initially by the federal courts. State courts are, of course, bound by the Constitution of the United States and

if violations of constitutional rights become involved and are decided erroneously, recourse may be had to this Court.

If uniform federal action is considered essential, then Congress should so state by proper legislation. Until that declaration is made the problem of train discontinuance remains, as it has always been, a matter for state control. If denial of the application is alleged to result in violation of the rights and guarantees of the 14th Amendment the question may be raised and decided in the state courts, and ultimately by proper proceeding to this Court. However, as to matters relating to local regulation, the decisions are interpretations of state law and no federal question is involved.

POINT B.

The Commerce Clause Is Not Involved.

The petition alleges that the action of the Montana Board and Montana Supreme Court casts an undue burden on interstate commerce contrary to Section 8, Article I of the Constitution.

This same question was presented in the Alabama Case, supra. The Court in footnote 9, 341 U. S. 341, 346, held that it could not consider "any impact of the order of the Alabama Public Service Commission might have on interstate commerce."

There is no provision in the Interstate Commerce Act which places jurisdiction over train discontinuance in the Interstate Commerce Commission. Until such a declaration is made by Congress, no such authority exists.

Palmer v. Commonwealth of Mass., 308 U. S. 79, 60 Sup. Ct. 34.
Alabama Public Service Comm. v. Southern Ry. Co., supra.

Article I, Section 8 of the U. S. Constitution specifies the duties of Congress. Congress may exercise the powers enumerated, but its determination not to act does not give foundation to a charge that state acts violate any of such enumerated powers. There is no basis, under the law now existing, to determine that the order in this case casts an undue burden on interstate commerce. *Petitioner's forum on this problem is Congress and not the Courts.*

POINT C.

The Action of the State Board and the Decision of the Supreme Court of Montana Is Not Violative of the Provisions of the Fourteenth Amendment to the Constitution.

The Supreme Court of Montana recognized the principle that the railroad is under the protection of the Constitution and is entitled to as full protection as other private property and cannot be taken without just compensation or without due process of law. Relying on the authorities cited, the Court found that there was insufficient showing to establish the fact that any constitutional right or guarantee had been interferred with. (R. 68, 69) The question raised is a federal question. The decision of the Montana Court is, however, in full accord with the controlling decision of this Court.

In the Alabama case, supra, the Court said:

> "The court below justified the exercise of its jurisdiction with a finding that continued operation of trains Nos. 7 and 8 would result in confiscation of appellee's property in violation of the Due Process Clause of the Fourteenth Amendment. In pursuing the threshold inquiry whether a federal court should exercise jurisdiction in this case, we find it unnecessary to consider issues relating to the merits of appellee's case, issues which appellants did not see fit to raise in this Court either in their Statement of Jurisdiction or in their briefs. We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 1907, 206 U. S. 1, 24-27, 27 S. Ct. 585, 593, 595, 51 L. Ed. 933. The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. Chesapeake & Ohio R. Co. v. Public Service Commission of West Virginia, 1917, 242 U. S. 603, 608, 37 S. Ct. 234, 236, 61 L. Ed. 520."

See also:

Chesapeake & Ohio Railway Co. v. Public Service Commission of Virginia, 242 U. S. 603, 37 Sup. Ct. 40, 61 L. Ed. 520.

Great Northern v. Nagle, 28 Fed. Supp. 812.

Southern Railway Co. v. South Carolina Public Service Comm., 31 Fed. Supp. 707.

The record in this case discloses that these particular trains are operated at a loss. The record also discloses that the Milwaukee is operating at a profit both systemwise and in

the State of Montana. While revenues on the branch line were not shown, it was stated that the line was a "very good revenue producing line". (R. 12, 68) No losses except those from these particular trains are relied upon.

Under these conditions the decision of the Montana Court that there was insufficient evidence to establish violation of the Fourteenth Amendment was correct. The decision is in accord with the controlling authorities.

CONCLUSION

The only federal question presented has been decided in harmony with the controlling authorities, no substantial federal question is raised for determination of this Court. The petition for certiorari should be denied.

Respectfully submitted,

ARNOLD H. OLSEN, *Attorney General of the State of Montana*

VERA JEAN HECKATHORN, *Assistant Attorney General of the State of Montana*

JOHN H. RISKEN, *Secretary-Counsel of the Board of Railroad Commissioners of the State of Montana*

EDWIN S. BOOTH, *Special Attorney*
Helena, Montana

Attorneys for the Respondent Board.

APPENDIX

MONTANA STATUTES

72-123, R. C. M. 1947: POWER TO COMPEL RAILROAD COMPANIES TO PROVIDE ADEQUATE ACCOMMODATIONS AND SERVICE. The board shall have the power, and it shall be its duty, to compel any and all railroads subject hereto, to provide, maintain, and operate sufficient train service, both freight and passenger, for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting-rooms for passengers, and suitable rooms for freight and baggage at all stations.

72-132, R. C. M. 1947: ACTION TO DETERMINE REASONABLENESS OF RATES OR CLASSIFICATION. Any railroad may bring an action in the district court of the county where the principal office or place of business is situated, or in any county where any such classification, rate, toll, charge, regulation, or order of the board is applicable, against the said board as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order made, fixed, or established by the board under the provisions of this act is just and reasonable; provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; and provided further, that in any action, hearing, or proceeding in any court, the classification, rate, tolls, charges, regulations, and orders made, fixed, and established by said

board shall prima facie be deemed to be just, reasonable, and proper. All costs and expenses incurred in the hearing, trial, or appeal of any action brought under this section shall be fixed and assessed as to the court may seem just and equitable.

Office-Supreme Court, U.
FILED
AUG 11 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 168

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Wisconsin corporation,
Petitioner,

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, AUSTIN B. MIDDLETON and LEONARD C. YOUNG, Members of said Board, and ARNOLD OLSEN, Attorney General of the State of Montana,
Defendants,

and

THE RAILROAD BROTHERHOODS OF RAILROAD TRAINMEN, ENGINEERS, FIREMEN and CONDUCTORS, hereinafter designated as THE FOUR BROTHERHOODS,
Intervenors,

and

CITIZENS' COMMITTEE, a Voluntary Organization along said Line of Railroad,
Intervenor,

and

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
Intervenor.

BRIEF OF INTERVENORS AND RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

Lester H. LOBLE AND LOBLE
GENE A. PICOTTE
Securities Building, Helena, Montana

Attorneys for The Railroad Brotherhoods of Railroad Trainmen, Engineers, Firemen and Conductors, hereafter designated as The Four Brotherhoods, and Citizens' Committee, a Voluntary Organization along said line of Railroad, Intervenors and Respondents.

THUMBLY'S HELENA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 168

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Wisconsin corporation,
Petitioner,

vs.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, AUSTIN B. MIDDLETON and LEONARD C. YOUNG, Members of said Board, and ARNOLD OLSEN, Attorney General of the State of Montana,
Defendants,

and

THE RAILROAD BROTHERHOODS OF RAILROAD TRAINMEN, ENGINEERS, FIREMEN and CONDUCTORS, hereinafter designated as THE FOUR BROTHERHOODS,
Intervenors,

and

CITIZENS' COMMITTEE, a Voluntary Organization along said Line of Railroad,
Intervenor,

and

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
Intervenor.

BRIEF OF INTERVENORS AND RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

REFERENCES TO RECORD

We shall adopt the same system of reference as that employed by Petitioner, to-wit, references made herein to the printed record will be designated (R. ....), and references

to unprinted portions of the transcript and to original exhibits will be designated (Tr. ....) and (Ex. ....), respectively.

The original transcript of the record before the Board of Railroad Commissioners of the State of Montana, has been certified to this Court as one of the exhibits contained in the record on appeal to the Supreme Court of the State of Montana, which it was. However, this transcript, though one of the exhibits, has never been, at any stage of the proceedings, and is not now, designated by number or otherwise. Therefore, references to such transcript will be designated (Exhibit, Record before Board of Railroad Commissioners, p. ....).

OPINIONS BELOW

1. The opinion and order of the Board of Railroad Commissioners of the State of Montana (R. 6) is reported in 89 P. U. R. (NS) 475.

2. The judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark (R. 52), not reported.

3. The opinion of the Supreme Court of the State of Montana (R. 62) and its Order denying rehearing (R. 71) are reported in 255 Pac. (2d) 346-352, and in 9 State Reporter 33-39. They are not yet printed in the Montana Reports.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on March 5, 1953. (R. 62) Petition for

rehearing was denied on April 13, 1953, and Remittitur issued on that date. (R. 71) The Petition for a Writ of Certiorari herein was filed on July 8, 1953. As pointed out in Petitioner's Brief (pages 2 and 3), the jurisdiction of this Court is attempted to be invoked by Petitioner under 28 U. S. C. A. Section 1257 (3).

QUESTIONS PRESENTED

This litigation was begun when the Milwaukee Railroad made application to the Board of Railroad Commissioners of the State of Montana for authority to discontinue operation of one passenger train operating each way daily between Harlowton, Montana, and Great Falls, Montana. An extensive and extremely exhaustive public hearing was held in Lewistown, Montana, (Exhibit, Record before Board of Railroad Commissioners, pp. 1-452). By its Order subsequently entered (R. 6), the Board denied the Milwaukee's application. Additional extensive and exhaustive evidence was heard at the trial before the Montana District Court. (Tr. 82-307).

From the pleadings and the evidence adduced before the Board and the Montana District Court, the following salient facts appear:

1. That the trains in question are the only passenger trains operated on this branch line. (R. 46).

2. That the Milwaukee Railroad, system-wide and throughout the State of Montana, is operating at a very substantial profit. (Exhibit, Record before Board of Railroad Commissioners, pp. 104 and 105); (Tr. 223); (R. 12).

3. That the branch line here in question is a "very good revenue producer". (Exhibit, Record before Board of Railroad Commissioners, pp. 104, 105).

4. That said line is a "very good revenue producer" primarily by reason of the colossal quantities of grain, cattle and other farm and ranch produce shipped out of the area to which the Milwaukee wishes to deny passenger service. (Exhibit, Record before Board of Railroad Commissioners, pp. 160, 172, 239, 240, 249, 322, and 323).

5. That the branch line in question is 199 miles long, and that 136 miles of that distance does not have all weather roads (R. 13, 17); (Ex. 2 and 47). (Tr. 294, 296, 297, 298, 300, 301, 303).

6. That these trains provide numerous and various essential services to the communities situated along this branch line, including services which are essential to the health of the residents of such communities, and which actually save lives in times of emergency. (See the testimony of all of the witnesses on behalf of Intervenors, (Exhibit, Record before Board of Railroad Commissioners). (R. 20).

When the Board of Railroad Commissioners of the State of Montana denied the Milwaukee's application, it did so upon the facts which had been presented to it at the hearing in Lewistown, Montana. When the Supreme Court of Montana upheld the action of the Board, it did so upon the facts appearing from the whole record. The Montana Supreme Court rendered the solitary, simple ruling that the Board's

denial of the Milwaukee's application was not unreasonable and did not deprive the railroad of any of its rights under the Constitution of the United States. (R. 62, 67-69). The Milwaukee's petition herein presents the single question whether the Order of the Board and the final judgment of the Supreme Court of Montana sustaining such Order, result in any violation of the Constitution of the United States.

STATUTES INVOLVED

The applicable State and Federal Statutes are printed in the Appendix, infra.

STATEMENT

The statement made by petitioner is substantially correct, as far as it goes, and no new statement will be made herein. However, we specifically call the Court's attention to the comprehensive summary of facts appearing in the Board's Order (R. 7-15), and the statement of facts contained in the opinion of the Supreme Court of Montana. (R. 63-67).

ARGUMENT

The Respondents, the Board of Railroad Commissioners of the State of Montana, and the Attorney General of the State of Montana, have filed herein their separate Brief in opposition to the Petition. We adopt as our own, in its entirety, the able argument contained in that brief. Our argument opposing the Petition herein will be directed to other matters appearing from the record, and not adverted to in that brief, which we believe to be of extreme importance.

PRELIMINARY

Petitioner's Brief contains a quantity of arrogant and contemptuous language, impugning the integrity and competence of the Board and of the Supreme Court of Montana. Though we realize this is not a brief on the merits, we feel impelled briefly to answer these astonishing allegations.

The Milwaukee in its Brief says its Petition should be granted "in order to correct what we believe to be a case of flagrant abuse of such delegated rights by local authorities for selfish purposes . . . .", and goes on to state that if its Petition is not granted "the Constitutional rights of any citizen can be circumvented and rendered valueless . . . and every individual could be left in like manner to the mercy of the state courts . . . ." (p. 4), and petitioner further asserts that "By its decision in the instant case . . . the Board of Railroad Commissioners and the Supreme Court of the State of Montana . . . have . . . demonstrated an obvious intention to disregard the urgent admonitions of more responsible agencies and courts . . . ." (p. 11).

We assert with vigor that the integrity and competence of the Montana Supreme Court are beyond reproach. We insist that the Supreme Court of our state is both honest and entirely responsible. We have always known these things, but would never have believed it would one day be necessary to affirm them to the highest Court in our land.

We add that the tender concern of the Milwaukee for the Constitutional rights of all citizens does not extend to those citizens to whom it wishes to deny passenger service, as the record shows.

SUMMARY OF ARGUMENT

POINT 1. A showing of the freight revenues from the particular branch line in question was an essential part of petitioner's case below, and the failure and refusal of petitioner to produce evidence thereof renders petitioner's case so incomplete as to require denial of the Writ presently prayed for.

POINT 2. Discontinuance of these passenger trains is unjustified in the light of petitioner's profits from its other operations.

AMPLIFICATION OF ARGUMENT AND CITATION OF AUTHORITIES

POINT 1. The record shows that upon the hearing of this case before the Board of Railroad Commissioners in Lewistown, Montana, and upon the trial thereof in the Montana District Court, no evidence was introduced by the Milwaukee to show the freight revenues from the line of railroad here involved. All efforts of the intervenors to obtain this information were met by the Milwaukee with a flat refusal to furnish any information at all, and with the incredible assertion, in effect, that the Milwaukee Railroad really has no idea at all how much revenue it is deriving from freight operations conducted upon the line of railroad here involved. The extent of the Milwaukee's reluctance to enlighten anyone upon this matter may be observed by a

reading of the record at the following places: (Tr. 131-143, 255-258); (Exhibit, Record before Board of Railroad Commissioners, pp. 63, 74-84, 99-105).

The reason for this reluctance is apparent. The Milwaukee understandably did not want to be saddled with a record showing a certain amount of loss from passenger operations on this line, but at the same time showing a relatively huge profit from freight operations over the same line, derived from the same area and people to whom it wishes to deny passenger service. In plain language, the Milwaukee is here asking the Court to determine that it is entitled to take these passenger trains out of operation solely upon a showing of the expenses and revenues involved in the operation of the passenger trains alone, and to consider and decide the matter *as though the passenger operation was the only operation conducted upon this line.*

The Milwaukee cannot make out a case without producing evidence of revenues derived from its freight operations on this particular line. It has not carried its burden of proof unless it has produced evidence to show not only that the passenger trains which it wishes to discontinue are losing money, but that the operation of the passenger trains causes the entire operation of this line to be uneconomic, and that the loss, if any, sustained as a result of the operation of the passenger trains, *considered in relation to the revenue produced by all of the activities on the line,* is such as to outweigh the demonstrated public convenience represented by the operation of the passenger trains and the demonstrated public necessity for their operation.

A clear statement of the law on this matter is found in State vs. Georgia and So. F. Ry. Co., 139 Fla. 115, 190 So. 527, 123 A. L. R. 914. There the Court said:

> "In determining whether local train service may be reduced, all revenue receipts of every nature and kind on and from the particular line and the entire system should be considered as well as the total proper expenses."

See, also, In the Matter of the Application of the Union Pacific Railway Company, etc., 134 Pac. (2nd) 1073, 1078.

The public policy which is the basis of this doctrine has been well stated by this Court in Chesapeake and O. R. Co. vs. Public Service Commission, 242 U. S. 603, 61 L. Ed. 520, 37 S. C. 234, as follows:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. *It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss . . . that there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness . . . are also to be considered.*" (Italics ours)

This Court recently held that passenger deficits are properly taken into consideration by the Interstate Commerce Commission in the fixing of both interstate and intrastate freight rates. King vs. United States, ... U. S. ...., 97 L. Ed. 207.

Such is and has been the practice of the Interstate Commerce Commission. The inevitable corollary to this situation is that freight revenues must be considered in determining whether a railroad is entitled to discontinue passenger service because there is a deficit. See also U. S. vs. La., 290 U. S. 70.

This Court in the King case, supra, made it perfectly clear that freight and passenger operations can no longer be considered apart from each other. Rather, the effect of each upon the other must be considered.

In B. and O. R. Co. vs. United States, October Term, 1952, Case No. 258, decided March 16, 1953, this Court held that

> "so long as rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of non compensatory rates for carrying some commodities when the public interest is thereby served."

Under the above cited authorities, we respectfully submit that the absence from the record of any evidence concerning the freight revenue which the Milwaukee derives from the branch line in question, renders the petitioner's case fatally deficient, and requires denial of the Writ.

POINT 2. In spite of petitioner's absolute refusal to produce any figures disclosing its revenue from freight operations on this line, enough testimony was elicited from petitioner's unwilling witnesses, and enough testimony was given by Intervenors' witnesses, to justify the conclusion that the railroad is well able to absorb the loss allegedly sustained from the passenger operation in question.

W J. Whalen, Vice President and General Manager of the Milwaukee, admitted that the line in question is a very good revenue producer, and virtually admitted that on the basis of per capita of population served, there is not a better revenue producing line on the entire Milwaukee system. (Exhibit, Record before Board of Railroad Commissioners, pp. 104, 105).

At the time of the hearing in Lewistown, Montana, at least three million bushels of grain were stocked in public warehouses along this line. (Exhibit, Record before Board of Railroad Commissioners, p. 249). The little town of Denton alone ships a million and a quarter bushels of grain a year over the Milwaukee. (Exhibit, Record before Board of Railroad Commissioners, p. 240).

The Chamber of Commerce of Great Falls, Montana, investigated the matter and discovered that approximately twelve thousand six hundred cars of freight were shipped in and out of the city of Great Falls alone during the years 1949 and 1950 over this line. (Exhibit, Record before Board of Railroad Commissioners, p. 122).

These figures will apprise the Court of the vast amount of freight business which the Milwaukee is doing over this line, to a sufficient extent that the justification for requiring the Milwaukee to furnish minimum passenger service may be seen. The import of these figures is fortified by the refusal of the Milwaukee to give any information about its freight revenues. There can be no unlawful taking of the Milwaukee's property, in the absence of some showing that the

railroad is not making a reasonable profit on its over-all operations. King vs. United States, ___ U. S. ___, 97 L. Ed. 207; B. and O. R. Co. vs. United States, October Term, 1952, Case No. 258, decided March 16, 1953.

In closing, we respectfully refer the Court to the record made at the hearing before the Board of Railroad Commissioners at Lewistown, Montana, the transcript of which has been certified and transmitted to this Court as an Exhibit. It would be impossible adequately to review in this Brief all of the testimony contained in that record. Thirty-six reputable residents of the communities served by trains 117 and 118 told the Commission about the need for the continued operation of those trains. That record discloses how vital these two passenger trains are to the life of the communities along the line. From the record of that hearing the Court may understand why the people who live along the line between Great Falls and Harlowton feel that the Milwaukee Road is turning its back on them. In that record the thousands of people whose needs and whose futures are at stake in this action have argued the case more forcibly and more conclusively than could be done in any legal brief.

We respectfully submit that the Writ prayed for by petitioner should be denied.

Respectfully submitted,

LOBLE AND LOBLE

GENE A. PICOTTE

Attorneys for Intervenors, The Four Brotherhoods and Citizens' Committee.

APPENDIX

APPENDIX i

MONTANA STATUTES

72-123, R. C. M. 1947: POWER TO COMPEL RAILROAD COMPANIES TO PROVIDE ADEQUATE ACCOMMODATIONS AND SERVICE. The board shall have the power, and it shall be its duty, to compel any and all railroads subject hereto, to provide, maintain, and operate sufficient train service, both freight and passenger, for the proper and reasonable accommodation of the public, and to provide and maintain suitable waiting-rooms for passengers, and suitable rooms for freight and baggage at all stations.

72-132, R. C. M. 1947: ACTION TO DETERMINE REASONABLENESS OF RATES OR CLASSIFICATION. Any railroad may bring an action in the district court of the county where the principal office or place of business is situated, or in any county where any such classification, rate, toll, charge, regulation or order of the board is applicable, against the said board as defendant, to determine whether or not any such classification, rate, toll, charge, regulation, or order made, fixed, or established by the board under the provisions of this act is just and reasonable; provided, that until the final decision in any such action the classification, rate, toll, charge, regulation, or order of the board affecting rates or charges shall be deemed to be final and conclusive; and provided further, that in any action, hearing, or proceeding in any court, the classification, rate, tolls, charges, regulations, and orders made, fixed, and established by said board shall prima facie be deemed to be just, reasonable, and proper. All costs and expenses incurred in the hearing, trial, or appeal of any action brought under this section shall be fixed and assessed as to the court may seem just and equitable.

UNITED STATES STATUTES

28 U.S.C.A. §1257: STATE COURTS; APPEAL; CERTIORARI:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States (June 25, 1948, c. 646, 62 Stat. 929.)

Supreme Court, U. S.
FILED
SEP 1 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 168

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Wisconsin corporation,
Plaintiff and Petitioner,

v.

THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, PAUL T. SMITH, AUSTIN B. MIDDLETON and LEONARD C. YOUNG, Members of said Board, and ARNOLD OLSEN, Attorney General of the State of Montana,
Defendants and Respondents,

and

THE RAILROAD BROTHERHOODS OF RAILROAD TRAINMEN, ENGINEERS, FIREMEN and CONDUCTORS, hereinafter designated as THE FOUR BROTHERHOODS,
Intervenors and Respondents,

and

CITIZENS' COMMITTEE, a Voluntary Organization along said Line of Railroad,
Intervenors and Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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August 26, 1953

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INTRODUCTION

From the briefs filed on behalf of the Respondent Board of Railroad Commissioners, and on behalf of the Respondent Intervenors, it apears that the principal arguments advanced in opposition to our petition for writ of

certiorari are in substance that:

(1) Statements contained in Petitioner's brief cast reflection on the Montana Supreme Court and on the Montana Board of Railroad Commissioners.

(2) The Milwaukee's operations systemwide show a profit.

(3) Freight revenues derived from operations over the branch line in question were not taken into consideration.

We are mindful of the Court's desire that parties refrain from extended argument, but a brief reply at least on the points referred to appears necessary.

DEFERENCE TO MONTANA COURT AND BOARD

It was not our intention by anything contained in our brief to cast reflection upon the integrity of the Montana Supreme Court or of the Montana Board of Railroad Commissioners. We readily concede that in arriving at their decision in this case they did so in good faith, with honest conviction, and in accordance with what they may have believed the law and the merits of the case deserved. However, it is inherently characteristic in proceedings of this kind that local Boards and Courts are commonly inclined to give undue consideration to local interests in opposition to the general principles governing public need and convenience. Whether the basis for such attitude be founded in local pride, sentiment, sympathy or understandable favoritism, and regardless how sincere and honest their judgment may be, the end result bespeaks an arbitrary and selfish attitude and results in error. We do not mean to impune the integrity or sincerity of either the Montana Supreme Court or the Montana Board of Railroad Commissioners. However, we do believe that their action in

this case is an outstanding example of just such error, and demonstrates the need for review by this Court, removed as it is from any distortion by local loyalties, not merely to correct error in this particular case, but more especially as a guide and precedent to other State Courts which must henceforth handle all proceedings such as this under the decision in the case of *Alabama Public Service Commission v. Southern Railway Company*, 341 U.S. 341.

If there be anything contained in this, or in our previous remarks, which may be thought to be disrespectful toward either the Montana Supreme Court or the Montana Board of Railroad Commissioners, it is entirely unintentional and misunderstood.

RAILROAD PROFITS

Admittedly, the Milwaukee Railroad has shown a slight profit in recent years. The total figure, considered alone, may appear to be large, but in relation to capital investment the return is clearly sub-standard and marginal by any measure of comparison. As pointed out on page 15 of our original brief, the Milwaukee's rate of return on net investment during the five year period covered by the record in this case, varied from a low of 1.95 per cent to a high of 2.93 per cent. The marginal nature of the Milwaukee's operations and financial condition was pointed out by Mr. J. W. Severs, Vice President in charge of Finance and Accounting, in his testimony beginning at pages 110 and 140 in the unprinted transcript.

It is not necessary in a proceeding of this kind that the carrier's operations must result in a net loss; it is sufficient merely to show that the carrier is being deprived of a fair return upon its property invested. As stated in *Mississippi Railroad Commission, et al, v. Mobile & Ohio Railroad Company*, 244 U.S. 388, 391:

"This power of regulation, if it is exercised in such an

arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service, passes beyond lawful bounds, and is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States. *Atlantic Coast Line RR. Co. v. North Carolina Corporation Commission,* 206 U.S. 1; *Missouri Pacific Ry. Co. v. Nebraska,* 217 U.S. 196; *Missouri Pacific Ry. Co. v. Tucker,* 230 U.S. 340; *Northern Pacific Ry. Co. v. North Dakota,* 236 U.S. 585."

It is stated in both briefs filed on behalf of Respondents that the Milwaukee is operating at a profit not only systemwide, but also in the State of Montana. We do not believe there is any justification in the record to support the statement that the Milwaukee's operations in Montana are profitable. There is nothing in the record to show what the actual revenue or expenses attributable to Montana operations may be, and certainly there is nothing in the record to show what the capital investment in Montana may be. We assume that Respondents' statement is based on figures shown by schedules attached to annual reports filed by the Milwaukee with the Montana Railroad Commission, as explained in the Commission's Order (R. 12). These reports, as filed with the Railroad Commission, were referred to in the testimony of various witnesses, but they were not introduced in evidence. However, even if they be deemed a part of the record for purposes of reference, they do not substantiate the statement that the Milwaukee's operations in Montana are profitable. As explained by various witnesses (Tr. 126, 215, 235) the figures shown by these schedules attached to the Montana Reports, and similar figures relating to revenues, expenses and net railway income from passenger service in Montana as shown by Exhibits 14, 36 and 38, represent merely a proportion-

ate share of actual figures for system operations arbitrarily allocated to Montana operations on a mileage basis. The allocation on this basis was made solely to conform with requirements prescribed by the Montana Railroad Commission, and as explained by the witnesses is meaningless for all practical purposes. The resulting figures have absolutely no relation whatever to actual operations in Montana, and do not provide any basis whatever to support the statements made by Respondents that the Milwaukee's operations in Montana are profitable.

FREIGHT REVENUES

It is most significant, in our opinion, that the Respondent Board of Railroad Commissioners does not concur in the contention urged by the Respondent Intervenors, to the effect that freight revenues derived from operations over this branch line must be taken into consideration in connection with this application to discontinue passenger service. On the contrary, it is, and always has been, the position of the Montana Railroad Commission that freight revenues are wholly immaterial in determining an application to discontinue passenger service. For the Court's convenience, we quote from the Board's Order in this case (R. 15, 16) its comments and views on this phase of the matter as follows:

> "Considerable evidence was offered by the protestants as to the amount of freight traffic originating on this branch. By cross examination they sought to obtain figures as to freight revenue but the Milwaukee took the position that these figures were immaterial. Testimony was offered showing that the freight revenues had been requested by one witness and were not furnished. This case involves an application to abandon a portion of the service, namely the passenger service. The question of whether the freight service is conducted at a profit or loss or whether the branch as a

whole operate at a profit or loss is immaterial to the question before us which is the public need and convenience to be served by the operation of these two passenger trains. The remarks of this Commission *In Re: Northern Pacific Railway Co.*, PUR 1924B, 729 are applicable here. In that case the Commission said:

'(1) Considerable criticism is made of the applicant's figures covering branch line revenues and expenses and protestant repeatedly allude to the total revenue figures for the branch, including receipts from freight both in carload and less-than-carload-lots. We are not at liberty to consider in a passenger service case receipts accruing from freight service. The rights of each class of traffic are to be considered with (without-?) reference to the other. The deficiencies in passenger revenues are not to be heaped upon freight shippers and, conversely, passengers are not to be burdened with losses from freight traffic, if any. Indeed, all of this is so plainly in the primer of rate making, that reference to the segregation ought not now to be necessary.' "

Courts have generally adopted the same view as indicated by the following cases:

Northern Pac. Ry. Co. v. Board of Railroad Com'rs of State of Montana et al (U.S.D.C. Mont.), 46 F. Supp. 340.

Ann Arbor R. Co. v. Michigan Public Service Commission et al (U.S.D.C. E. D. Michigan S. D.), 91 F. Supp. 668.

Atlantic Coast Line R. Co. v. Florida R.R. & Public Utilities Commission et al (U.S.D.C. N. D. Florida Tallahassee Division), 96 F. Supp. 583.

In re: Application of *Chicago, Burlington & Quincy R.R. Co.*, 152 Neb. 367, 41 NW 2d 165.

Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners, 5 N.J. 114, 74 A. 2d 265.

The cases cited on page 9 of the brief of Respondent Intervenors are not in point, since in those cases there was a statutory or charter obligation on the part of the Railroad to operate the particular trains involved. The decision of this Court in the case of *King v. United States,* 344 U. S. 254, 97 L. Ed. (A. O.) 207, cited by Respondent Intervenors, is certainly no authority for their contention that passenger service may not be discontinued so long as freight revenues are sufficient to absorb the losses resulting therefrom. That case merely holds that as a matter of practical necessity passenger deficits must be considered in fixing freight rates, since there is no other way by which such losses can be absorbed. As previously noted, the rate decisions of the Interstate Commerce Commission and the Committee Reports referred to and upheld by this Court in the *King* case, have deplored the necessity which imposes passenger deficits on freight traffic, and have urged all railroads and regulatory agencies to minimize the problem involved by eliminating unprofitable and unnecessary passenger service wherever possible, and by adopting a more realistic attitude in dealing with such matters. Rather than support the contention now being urged by the Respondent Intervenors, the *King* case highlights a predicament confronting the railroad industry today largely as a result of just such false practice in the past, and suggests the exact opposite. To adopt the Intervenors' contention would merely aggravate and compound the unfortunate situation giving rise to the *King* case, and would result in an endless spiral of increased freight rates to absorb losses from passenger operations, and costly passenger operations continued solely by reason of the increased freight rates thus obtained, and so on ad infinitum, or until increased freight rates cease to be productive and complete collapse results.

The absurdity of the contention being urged by Respondent Intervenors is further demonstrated by the logical consequences which would follow from such a rule. If, in order to discontinue a passenger service over a branch line it must first appear that all operations over the branch line, including freight, are conducted at a loss, then it logically follows that no railroad can discontinue a branch line passenger train until the entire operation over that line, including freight, results in such a loss as to require abandonment of the line itself. The further application of the rule would mean that a railroad cannot discontinue a passenger operation over any of its main line until it can show that it is bankrupt.

The foregoing should dispense with the need for any further consideration of freight revenues. However, in connection with the statement made by General Manager Whalen to the effect that in his opinion the freight traffic on this branch line was such as would make it a "good revenue producer," repeatedly referred to by the Respondents and to which they apparently attach great significance, it should be noted that Mr. Whalen also pointed out the traffic movement was seasonal in nature and the density of traffic was comparatively light, and as he stated, "It's density of traffic that pays your expenses" (Tr. 259). Moreover, as compared with other operations Mr. Whalen also testified as follows (Tr. 258):

> "Q. Can you name any 199 miles of comparable line that is a greater producer of freight revenue than this one?
>
> "A. I know of no 199 miles east that isn't a greater producer of freight revenue."

Also, we specifically deny the representation made by Respondent Intervenors in their brief to the effect that the Milwaukee has been "reluctant" to disclose the freight

revenues derived from its operations on this particular branch line, and the apparent implication that the Milwaukee has thus endeavored to suppress pertinent evidence; in our view of the matter, for reasons stated above, freight revenues are irrelevant and have no place in proceedings of this kind, and the practical difficulties involved in developing such data would be prohibitive, as fully explained in the affidavit appearing in the unprinted transcript at pages 78-80, and in Mr. Severs's testimony (Tr. 134).

OTHER MISCELLANEOUS ARGUMENTS

Whether or not the decision of a State Court on matters of statutory construction, interpretation and procedure is necessarily controlling, as contended in the brief of Respondent Board of Railroad Commissioners under point A, there is no such question here involved and it has no bearing in this case. Under points A and B it appears to be Respondent's contention that the regulation of intrastate train service is strictly a matter for local regulation and determination by the State; and in the absence of congressional action giving the Interstate Commerce Commission jurisdiction over such matters, the Petitioner cannot be heard to complain that any decision by the Montana Board or by the Montana Supreme Court, however arbitrary, violates either the Due Process Clause or the Commerce Clause of the Federal Constitution. Such is, of course, at variance with the many cases where action by State Boards and Courts has been reversed by this Court, notwithstanding the absence of any Federal legislation on the subject, and requires no further comment.

For the sake of brevity, we pass any particular reference to these and other arguments advanced by the Respondents in their briefs. In so doing, our action is not to be construed as a recognition of any merit contained there-

in; rather, it appears to us that the arguments advanced either are not pertinent to the issues in the case, or are so completely at variance with well established principles as to require no further response.

CONCLUSION

Accordingly, the Petitioner respectfully reasserts its contention that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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